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Robert M. O'Neil

Rodney A. Small

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Free Speech in the College Community

Robert M. O'Neil,
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Reviewed by Rodney A. Smolla[*]

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{1} Robert O'Neil has written the book he was destined to write: *Free Speech in the College Community*.^[1] The former President of the University of Virginia and the University of Wisconsin, O'Neil is a distinguished lawyer and First Amendment scholar who has long been active in disputes involving student speech and academic freedom. He has parlayed those credentials into a book that is both creative and accessible. For both lawyers and non lawyers interested in campus speech issues, there is no better text available.

{2} Disputes over freedom of speech come in virtually all shapes and sizes on today's university campuses. A racial slur directed at two African-American women walking past a student dorm creates a call for a new speech code.^[2] An engineering professor who wrote a book claiming that the Holocaust never happened, generates a cacophony of protest calling on the university administration to discipline or dismiss the professor for his outrageous views.^[3] A group of male first-years send e-mail messages to a group of female students containing graphic sexist jokes. The female students file a complaint with the United States Office of Civil Rights which launches an investigation to determine if the university is in violation of civil rights laws.^[4]

{3} A male sophomore posts a short story on a bulletin board containing fantasies about engaging in a violent sexual assault on a female student, using her actual name and the university is pressured to discipline the author.^[5] A professor is investigated by state officials for downloading material that is sexually explicit, but not legally obscene, from the Internet onto his university computer.^[6] The Black Student Alliance invites a militant Black Muslim minister to speak on the campus, who only weeks earlier made highly controversial remarks that were brazenly anti-Semitic, anti-Catholic, and homophobic. The university is asked to bar the speaker from the campus.^[7] The Gay and Lesbian Alliance sues a university after being denied official recognition and university funding.^[8]

{4} A state university refuses to fund the newspaper of a Christian student group, on the grounds that funding the newspaper, which is pervasively religious and openly proselytizing in nature, violates principles of

separation of church and state. The Christian group also sues.^[9] The main campus student newspaper, which receives about half of its operating revenues from the state university but is almost entirely autonomous and independent in its editorial and journalistic decisions, is asked to run advertising by a group that denies the Holocaust. The newspaper's editors are split over whether to run the ad. The university president wants to know whether to intervene, and if so, on which side.^[10]

{5} An art professor wishes to display his art in the corridors of the university center; but the art, while highly regarded within the artistic community, is perceived as racist, sexist, and blasphemous by many students and faculty. The administrator in charge of assigning space for such paintings is besieged by calls to reject the art, as well as calls to place it in a place of prominence within the auditorium.^[11] A professor doing research on race relations is offered a grant, to be administered through the university, by a private group that is widely understood to have an agenda of racial supremacy. A faculty research oversight committee recommends that the school reject the grant.^[12]

{6} O'Neil also includes case studies involving problems which arise out of the use or application of new technologies. For example, he analyzes the case of Jake Baker, a student at the University of Michigan who was arrested on charges of transporting threatening material across state lines. Baker wrote and posted on the Internet a fictional account of the rape and torture of a fellow student. Among the gruesome details in the story was the application of a hot curling iron as an instrument of torture. Baker named the actual student of his fantasy in his posting.

{7} Baker was "caught" by an alumnus who came across the story while surfing the Internet. This alumnus complained to university officials, who in turn contacted law enforcement authorities. Baker was criminally charged and summarily suspended by the university. A federal judge ruled in Baker's favor, finding that his mere fantasies and dreams were entirely disconnected from any genuine threat to anyone's safety, and the prosecution amounted to nothing less than criminalizing thoughts and desires.^[13]

{8} O'Neil then describes the university's dubious disciplinary action. He calls the school's suspension heavy handed and contrary to the values of freedom of speech which ought to pervade campus life. In addition, he states that the action is unlikely to achieve the positive results of increasing tolerance or sensitivity within the campus. A more measured and sensitive response, O'Neil believes, would be to encourage Baker to engage in counseling sessions.

{9} Throughout all of these disputes runs the thread of the ideal of academic freedom, and the question of the role of the university in today's society. There is an endearing image of the university as set off from the rest of society, not disconnected or irrelevant, but still somehow spatially removed. The university is viewed as an island of retreat from society's constraints. The phrase "academic freedom" conjures up this image of insulation. Wrapped in this term are the many claims and intimations that on college campuses, policies and rules binding on the rest of society should not always apply, because universities are unique, in their importance and in their vulnerability. Campuses today are under pressures from many quarters to compromise the noble idea of the university as an island of intellectual inquiry and robust discourse. Colleges are under pressure to maintain some degree of separation from the commands of the sovereign, the tantalizing seductions of gigantic financial grants, the whimsical ebbs and flows of mass politics, and the forces of prejudice.

{10} Academic freedom is a right to be taken seriously, a right distinctly valuable at a time when the world is so in need of rigorous, creative, long-term thinking about the challenges of the future. Academic freedom is a complex right which will at times have conflicting claimants: students, faculty, administration, trustees, outside speakers. Yet at its core, academia should stand inviolable. Lest we permit the arts, sciences, and professions to be smothered by a depressing pall of orthodoxy, we must guard against outside interference with the direction of research, faculty selections, and the selection of subject matter.

{11} O'Neil deals with these issues and more, in chapters on speech codes, outspoken professors, new technologies, off-campus speakers, the speech rights of gay and lesbian students, fraternities and sororities, college newspapers, artistic freedom on campus, academic freedom in research and teaching, and free speech issues at private universities.

{12} The format is innovative. Each chapter begins with a fictional letter from a fictional college president seeking policy and legal advice on a basketful of speech issues currently confronting the campus. The advisor then drafts a memorandum advising the president, interweaving actual examples of similar disputes at other campuses, political pros and cons, issues of policy, and objective legal advice. By using this format, O'Neil is able to present campus free speech issues in a layered and complex manner, while always maintaining a firm and remarkably crisp narrative hold.

{13} Simply as a compendium of examples of modern speech controversies on campuses, the book is invaluable. O'Neil presents hundreds of campus free speech incidents, providing the reader with the sense that he or she at least knows the lay of the land -- what has happened at other institutions and how they have dealt with it. Drawing on the political wisdom that a university president inevitably and often painfully accumulates, O'Neil is able to describe the various forces from on-campus and off-campus groups that come to bear on these controversies. He also presents, with refreshing candor and balance, the policy pros and cons of various alternative responses, setting them forth against the backdrop of the judicial decisions in which these alternatives have been litigated.

{14} O'Neil's own policy preferences do ring through. He consistently favors freedom over control. The free speech rights of individual students and faculty members will, for O'Neil, almost invariably trump the countervailing interests of the university, even when the speech at issue is deeply offensive or outrageous. Yet there is a pragmatic subtlety to O'Neil's judgments that makes *Free Speech in the College Community* an especially rich and rewarding book.

{15} O'Neil adeptly articulates the difference between sanctions imposed by a university because it finds the speech of a student or faculty member disagreeable, and sanctions imposed by a university for performance that fails to meet objective standards of quality and competence. Similarly, he explains in great detail and with passion, the many steps short of censorship that a university may undertake to pursue such goals as racial tolerance or academic integrity. He presents strategies of leadership that usually involve the corrective of education and moral suasion aimed at countering bigotry and ignorance. The book thoughtfully surveys these issues and provides the reader with insight drawn from his vast experience with First Amendment issues on college campuses.

[] NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Rodney A. Smolla, "*Free Speech in the College Community*", 4 RICH. J.L. & TECH. 8, (Spring 1998), at <http://www.richmond.edu/~jolt/v4i3/smolla.html>.

[*] [Allen Chair of Law](#), [University of Richmond](#), [T.C. Williams School of Law](#).

[1] ROBERT M. O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY (1997).

[2] See generally *id.* at 2-7.

[3] *Id.* at 27, 49.

[4] *Id.* at 53.

[5] *Id.* at 56-65; [United States v. Baker](#), 890 F.Supp 1375 (E.D. Mich. 1995) *aff'd sub. nom.* [United States v. Alkhabaz](#), 104 F.3d 1492 (6th Cir. 1997).

[6] See O'NEIL, *supra* note 2, at 52.

[7] *Id.* at 77-80.

[8] *Id.* at 99-101, 106-108.

[9] *Id.* at 99. See also [Rosenberger v. Rector and Visitors of the University of Virginia](#), 515 US. 819 (1995).

[10] O'NEIL, *supra* note 2, at 131-2, 135-6.

[11] *Id.* at 149-151; *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970).

[12] *Id.* at 168, 171-9.

[13] [United States v. Baker](#), 890 F.Supp. 1375 (E.D. Mich. 1995) *aff'd sub. nom.* [United States v. Alkhabaz](#), 104 F.3d 1492 (6th Cir. 1997).

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